ATTORNEY FOR APPELLANT:

LAWRENCE R. WHEATLEY
Danville, Indiana

ATTORNEYS FOR APPELLEE:

JOHN A. CREMER
SUZANNE E. KATT
Cremer & Cremer
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

JANET KAY LEWIS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 32A01-0805-CV-248
	)	
ESTATE OF ARTHUR KENWORTHY, LYLE KENWORTHY, PERSONAL REPRESENTATIVE,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Robert W. Freese, Judge
Cause Nos. 32D01-0706-ES-180
32D01-0611-EU-241

December 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Janet Kay Lewis appeals the trial court's grant of summary judgment in favor of the Estate of Arthur Kenworthy ("the Estate") finding Janet did not contest the will within the statutory period allotted by Indiana Code section 29-1-7-17. On appeal, Janet raises two issues, which we consolidate and restate as whether the trial court erred when it granted summary judgment in favor of the Estate. Concluding Janet failed to file an action to contest the will within the statutory period and has not presented evidence of fraud that would allow her to file an untimely action, we affirm.

Facts and Procedural History

Arthur Kenneth Kenworthy ("Father") was the parent of six children, Janet, Arthur Edward, Kyle, Debra, Lyle, and Judith.[1] Lyle Kenworthy lived with Father for approximately 43 years prior to Father's death. On May 17, 2004, Father executed a will ("Will 1") leaving his entire estate to Lyle. That same day and again on February 5, 2005, and February 8, 2005, Father executed and delivered to Lyle several deeds to real estate, constituting the entirety of Father's real estate holdings.

In July of 2006, Father was diagnosed with terminal cancer. From approximately September of 2006 until his death, Father underwent home hospice care which included heavy doses of pain relieving and sedating medications. On September 29, 2006, Janet and Arthur Edward took Father to see an attorney where Father executed a second will ("Will 2")

[1] Judith is described in the record as either a step-child or foster-child of Father. There is no indication in the record of whether or not Father ever adopted Judith. However, because her status is unimportant to our decision, we will refer to her simply as a child of Father.

leaving his entire estate equally to his six children.[2] There is no conclusive evidence in the record that Lyle ever saw or received a copy of Will 2 prior to Father's death or knew for certain that Will 2 had been validly executed.[3]

Father died on November 8, 2006; on November 10, 2006, Lyle filed a petition for probate of Will 1, issuance of letters testamentary, and unsupervised administration of Father's estate. Unable to locate the original copy of Father's will, Lyle filed a petition for probate of a lost or misplaced will on November 20, 2006. The trial court issued an order dated November 27, 2006, probating Will 1 and authorizing issuance of letters testamentary and unsupervised administration. On March 16, 2007, Lyle, through his attorney, sent a letter to Janet identifying Lyle as the personal representative of Father's estate, requesting the return of personal property purportedly belonging to the estate, and demanding that Janet cease acting as though she had authority with regard to Father's estate.

On July 21, 2007, Janet filed a petition for probate of Will 2, issuance of letters testamentary, and supervised administration of Father's estate. The trial court, having previously probated Will 1, issued an order dated July 5, 2007, probating Will 2 and authorizing issuance of letters testamentary and supervised administration. Discovering its mistake, the trial court issued an order dated August 14, 2007, suspending both Lyle's and Janet's powers of administration and setting the matter for hearing. The trial court then

[2] There is mention in appellant's affidavits and briefs that Father also executed a power of attorney naming Janet as his attorney-in-fact. However, the record does not contain any document executed by Father purporting to grant Janet a power of attorney.

[3] Janet stated in an affidavit that she informed Lyle of the existence of Will 2 on October 1, 2006. However, Lyle stated in his affidavit that he never saw a new will and did not believe a valid will could have been executed due to Father's reduced mental capacity.

consolidated both cases under a single cause number on September 24, 2007. On October 25, 2007, Lyle filed a motion for summary judgment accompanied by a memorandum of law and a designation of supporting evidence. That same day, Janet filed a motion to revoke the trial court's order probating Will 1. Lyle filed a response to Janet's motion on November 1, 2007. On November 28, 2007, Janet filed a designation of evidentiary material in response to motion for summary judgment consisting of affidavits from Donald, Kyle, Janet, and Lyle, and a sworn statement by Father taken at the time he executed Will 2. Janet did not file a memorandum of law in response to Lyle's motion for summary judgment.

On January 14, 2008, the trial court held a hearing on the motions and heard arguments from counsel. The trial court issued its order on January 24, 2008, granting the Estate's motion for summary judgment finding that "No will contest was filed within the statutory period allotted." Appellant's App. at 174. Janet filed a motion to correct error on February 25, 2008, which the trial court summarily denied on March 24, 2008. Janet now appeals.

Discussion and Decision

I. Standard of Review

When reviewing a grant of summary judgment, our standard of review is the same as that of the trial court. Shambaugh & Son, Inc. v. Carlisle, 763 N.E.2d 459, 461 (Ind. 2002). Summary judgment shall be rendered when the designated evidentiary matter shows there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). The moving party bears the burden of demonstrating prima facie

there are no genuine issues of material fact and that he is entitled to judgment as a matter of law. Estate of Verdi ex rel. Verdi v. Toland, 733 N.E.2d 25, 28 (Ind. Ct. App. 2000), trans. denied. Once the moving party meets this requirement, the burden shifts to the non-movant to set forth specifically designated facts showing there is a genuine issue for trial. Id. A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences. U-Haul Int'l, Inc. v. Nulls Mach. & Mfg. Shop, 736 N.E.2d 271, 274 (Ind. Ct. App. 2000).

II. Contest of the Probate of Will 1[4]

A. Statutory period to file a will contest action

Once a will has been admitted to probate, only a will contest action can present any question of the validity of the will. Niemiec v. Niemiec (In re Estate of Niemiec), 435 N.E.2d 999, 1001 (Ind. Ct. App. 1982). Indiana Code section 29-1-7-17 allows any interested person to contest the validity of any will in the court having jurisdiction over the probate of the will within three months after the date of the order admitting the will to probate. An action to set aside the probate of an alleged will is purely statutory and can only be brought and successfully maintained in the manner and within the limitations prescribed

[4] Janet's argument section consists of seven pages of various legal rules, some of which relate to her argument and some of which do not, with no application of those rules to the case at hand. As a result, we are required to piece together Janet's fraud argument from her Statement of Facts and Summary of the Argument sections, which has made our review of this case much more difficult. Counsel for Janet is reminded that Indiana Appellate Rule 46(A)(8) requires that all arguments be supported by cogent reasoning and citations to authority. Ordinarily, "a party waives any issue for which it fails to develop a cogent argument or support with adequate citation to authority and portions of the record." Romine v. Gagle, 782 N.E.2d 369, 386 (Ind. Ct. App. 2003). Nonetheless, because of our preference to decide cases that come before us on their merits, we proceed to decide this appeal. See Foley v. Mannor, 844 N.E.2d 494, 496 n.1 (Ind. Ct. App. 2006).

by statute. Johnson v. Morgan, 871 N.E.2d 1050, 1052 (Ind. Ct. App 2007). The three-month statutory time limit is jurisdictional and failure to exercise the right to contest a will within the three months generally results in the loss of the right. Phipps v. Wilson (In re Estate of Wilson), 610 N.E.2d 851, 854-55 (Ind. Ct. App. 1993); Niemiec, 435 N.E.2d at 1001. The three-month limitation is a statute of repose extinguishing the right, rather than a statute of limitation affecting the remedy. In re Estate of Brown, 587 N.E.2d 686, 691 (Ind. Ct. App. 1992).

However, the running of the statutory period will not foreclose a plaintiff from filing a will contest where the plaintiff has been induced to refrain from a timely filing by a fraudulent misrepresentation of the defendant. Niemiec, 435 N.E.2d at 1001. "The fraudulent conduct must have been the efficient or proximate cause of the failure to timely commence the action, and all the other elements entitling the plaintiff to equitable relief must be present." Id. The party bringing an untimely will contest action bears the burden to show that the defendant acted fraudulently and that the fraudulent conduct was the cause of her failure to timely file the action. Phipps, 610 N.E.2d at 855.

The trial court issued its order admitting Will 1 to probate on November 27, 2006. Therefore, Indiana Code section 29-1-7-17 requires any action contesting the validity of the will to be brought no later than February 27, 2007. Janet filed her petition for probate of Will 2, her first action that could be deemed a challenge to the validity of Will 1, on June 21, 2007. Janet missed the statutory deadline by nearly four months. "A proceeding to substitute an unprobated will for one already probated is a will contest and must be brought within the

statutory time period allotted for will contests." In re Estate of Brown, 587 N.E.2d at 690. The statutory right to contest Will 1 extinguished on February 27, 2006. Janet failed to contest the will before that date. Therefore, Janet lost the statutory right to contest Will 1 and the trial court did not err in finding that no will contest action was filed within the statutory period.

B. Tolling of the Statutory period by fraudulent activity

Janet argues, however, that Lyle acted in a fraudulent manner and that this fraud was the cause of her failure to timely file a will contest action. Janet has not alleged any fraudulent misrepresentations made directly to her that prevented her from filing a timely will contest action. Instead, Janet alleges that Lyle made material misrepresentations to the trial court when he offered Will 1 for probate that prevented her from receiving notice that Will 1 had been admitted to probate. Janet seems to be making a fraud on the court argument.

To succeed on a claim of fraud on the court, Janet must establish that Lyle used an unconscionable plan or scheme to improperly influence the trial court's decision and that his actions prevented her from fully and fairly contesting the will. See Stronger v. Sorrell, 776 N.E.2d 353, 357 (Ind. 2002). The doctrine of fraud on the court is narrowly applied and limited to the most egregious of circumstances. Id. It is not enough to show a possibility that the trial court was misled; Janet must show that the trial court's decision was actually influenced. Shepard v. Truex, 823 N.E.2d 320, 325 (Ind. Ct. App. 2005). Further, Janet must show that she suffered substantial prejudice due to the fraud, misrepresentation, or misconduct. Outback Steakhouse of Florida, Inc. v. Markley, 856 N.E.2d 65, 73 (Ind. 2006).

Janet alleges Lyle knew that Will 2 existed, that Will 2 replaced Will 1 as last will and testament of Father, and that the original copy of Will 1 was not lost or misplaced but had been removed by his brothers and sisters when Will 2 was executed. Even if we accept that Lyle fraudulently misrepresented these facts to the trial court and that his conduct influenced the trial court's decision, Janet does not explain how this fraud substantially prejudiced her ability to file a timely will contest action.

There is no dispute that Janet knew of the existence of Will 1 and knew that Lyle resisted the creation of Will 2. Notice that Will 1 had been admitted to probate was published according to statutory requirements. See Ind. Code § 29-1-7-7 (requiring notice to be published in a newspaper of general circulation in the county where the court is located for two consecutive weeks). Because Lyle was the only devisee listed on Will 1, the statute does not require him to give notice to his brothers and sisters. See Ind. Code §§ 29-1-7-5 (requiring petition for probate or letters to include the name of each legatee and devisee in the event decedent left a will), 29-1-7-7 (requiring notice served by certified mail on each heir, devisee, legatee, and known creditor whose name and address is set forth in the petition for probate or letters); Phipps, 610 N.E.2d at 855 (holding no duty to list in the petition for probate or provide notice to an heir who is not listed as a devisee or legatee in the decedent's will). Janet and several of her brothers live in Hendricks County where Will 1 was probated and where notice of probate was published. Therefore, Janet had an opportunity to discover that Lyle had probated Will 1.

Additionally, the probate code provides options for an interested person to either

object to the offering of a will for probate or to request notice of hearings and other matters related to the probate of the will. See Ind. Code §§ 29-1-7-6, 29-1-7-16. Janet had several avenues by which she could reasonably have discovered the allegedly fraudulent probate of Will 1 in time to commence the will contest action within the three-month time limit. Therefore, any alleged fraud committed by Lyle did not substantially prejudice Janet's ability to timely commence her will contest action. See Niemiec, 435 N.E.2d at 1001 ("Where the plaintiff had discovered or reasonably could have discovered the fraud in ample time to commence the action within the statutory period, fraudulent conduct of the defendant [will] not toll the running of the [three-]month statutory period.")

Further, even if we assume Lyle's conduct prevented Janet from filing a will contest action within three months, the evidence shows that Janet received at least constructive notice of the probate of Will 1 in the form of the March 16, 2007 letter from Lyle through his counsel informing Janet that Lyle was the personal representative of Father's estate. If we start the three-month period on March 16, 2007, Janet still failed to file her will contest action within the statutory period. Janet has not demonstrated that Lyle made any direct misrepresentation to her that caused her to miss the statutory period to file a will contest action. Additionally, Janet has failed to meet the high burden of proving fraud on the court. Therefore, the trial court did not err when found that Janet did not file her will contest action within the statutory period.

Conclusion

Janet failed to file an action to contest Will 1 within the three-month period prescribed

by Indiana Code section 29-1-7-17. Janet has also failed to demonstrate that any alleged fraud committed by Lyle was an efficient or proximate cause of her failure to timely file a will contest action. Therefore, the trial court did not err when it granted summary judgment in favor of Lyle.

Affirmed.

NAJAM, J., and MAY, J., concur.